No. 81-1618

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MILDRED L. JOSEPH, COLLEEN FINKS, LLOY GLOVER, SCOTT SEALS, and PHYLLIS FERGUSON,

Petitioners,

v.

CHRISTOPHER S. BOND, Governor, State of Missouri, and, RAY S. JAMES, Director, Missouri Department of Revenue,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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I

QUESTIONS PRESENTED[1]

1. Whether *Elrod* v. *Burns*, 427 U.S. 347 (1976) and *Branti* v. *Finkel*, 445 U.S. 507 (1980) are applicable to the termination not only of public employees but also of independent contractors or franchisees.

2. Whether party affiliation is an appropriate requirement for the effective performance of the duties of Missouri Department of Revenue fee agents.

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[1]This case presents questions which should be indistinguishable from the questions presented by the petition for writ of certiorari docketed in this Court as *Schenberg, et al.* v. *Bond, et al.*, No. 81-2046. The judgment of the Eighth Circuit, to which the petition for writ of certiorari in this case is directed, was based solely on the prior decision of the Court of Appeals in *Sweeney* v. *Bond*, 669 F.2d 542 (8th Cir. 1982), at which the petition in *Schenberg* v. *Bond*, No. 81-2046, is directed. Therefore, both cases should be considered together for purposes of determining whether the Court's writ of certiorari should issue in that the opinions and factual bases of both cases are substantially indistinguishable. The only difference in the two cases is that the plaintiffs in *Schenberg* were fee agents in the Eastern half of Missouri, whereas the plaintiffs in this case were fee agents in the Western portion of Missouri. The defendants have framed their questions presented exactly as they framed the questions presented in their brief in opposition to the petition for writ of certiorari in *Schenberg*. The questions as drafted correspond precisely to the questions taken up and determined by the Eighth Circuit. The petitioners have attempted to slant the questions presented in a manner which is detrimental to and prejudicial of a proper understanding of the judgment below. In addition, the first two questions presented as stated in the petition seek to invoke the analysis of this Court on an equal protection basis, whereas the complaint initiating this case did not state an equal protection cause of action.

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No. 81-2130

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

MILDRED L. JOSEPH, COLEEN FINKS, LLOY GLOVER, HOPE SMALL, and PHYLLIS FERGUSON,
Petitioners,

v.

CHRISTOPHER S. BOND, Governor, State of Missouri, and, RAY S. JAMES, Director, Missouri Department of Revenue,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

The respondents, Christopher S. Bond, Governor of the State of Missouri, and Ray S. James, Director of the Missouri Department of Revenue, respectfully request that this Court deny the petition for writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Eighth Circuit. The per curiam order of the Court of Appeals appears in the appendix to the petition at page A2. That order was wholly dependent upon the

prior opinion and judgment of the Eighth Circuit in *Sweeney* v. *Bond*, 669 F.2d 542 (8th Cir. 1982) also involving the terminations of motor vehicle license agents, like the plaintiffs (petitioners) in this case. A petition has also been filed with respect to *Sweeney. Schenberg* v. *Bond*, No. 81-2046. The judgment of the Court of Appeals in this case reversed the United States District Court for the Western District of Missouri. The trial court's opinion is reported at 522 F.Supp. 1363 (W.D.Mo. 1981), and it appears in the Appendix to the Petition at A18.

SUPPLEMENTAL STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked pursuant to Title 28 U.S.C. §§1331, 1343, 2201, and 2202, and Title 42 U.S.C. §1983. Contrary to the arguments made in support of reasons which the petitioners allege authorize the grant of certiorari, and contrary to the manner in which the petitioners have chosen to state their Questions Presented for Review, the complaint initiating this case included no equal protection cause of action.

In November, 1976, Joseph Teasdale, a Democrat, was elected Governor of the State of Missouri. Governor Teasdale defeated the incumbent, Christopher S. Bond, a Republican. Governor Teasdale took office in January, 1977. In 1980, Governors Teasdale and Bond were again opponents in the gubernatorial election. In the election of November, 1980, Bond defeated Teasdale. Governor Bond again took office in January, 1981. Shortly after he took office, he appointed Ray S. James as Director of Revenue. Mr. James affected the terminations of the agency relationships existing between the Department of Revenue and the plaintiffs.

Missouri state law authorizes the Director of Revenue to appoint motor vehicle license agents who are authorized

to issue license plates and permits, to transfer registrations, to issue or renew drivers' licenses, to accept applications for transfers of title, and to accept payments of motor vehicle sales taxes. With respect to each authorized transaction, revenue would result to the State. And, with respect to each transaction, the independent fee agent is authorized to collect a $1.00 transaction fee which becomes the agent's sole means of compensation. Fee agents are contracted to serve the vast majority of the smaller localities within the State of Missouri, with larger cities being served by branch offices of the Department of Revenue. When Governor Bond and Director of Revenue James assumed their duties in January, 1981, there were 158 local fee agencies, 21 of which were in the hands of civil organizations or municipalities. The nonpartisan civic organizations, 20 in number, had been appointed by Governor Bond during his first administration. All 137 individual fee agents, were Democrats appointed by Democratic Governors (Stipulation of the Parties).

The parties stipulated, and the District Court found, that plaintiffs, and fee agents generally, are not public employees of the State of Missouri. In three separate cases before the United States District Court for the Eastern District of Missouri, three District Judges had specifically found that fee agents are not employees of the State of Missouri, but "are more in the nature of independent contractors or franchisees." *Sweeney* v. *Bond,* 519 F.Supp. 124, 128 (E.D.Mo. 1981); *Joos* v. *Bond,* No. 81-1022-C(4) (E.D.Mo., Sept. 28, 1981) and *Orenstein* v. *Bond,* No. 81-1074-C(5) (E.D.Mo., Dec. 10, 1981).

Each of the plaintiffs was a fee agent for the Missouri Department of Revenue in Grandview, Clinton, Gladstone, Kahoka, and Savannah respectively (Pet. at A21). All of the plaintiffs are active Democrats and all were appointed

as fee agents during the administrations of governors who were also Democrats (Pet. at A21). Prior to her appointment as fee agent, each plaintiff was active in partisan party politics and supported the candidacies of persons running for public office on the Democratic ticket (Pet. at A21). Each of the plaintiffs contributed time or money, or both, to the 1976 and 1980 gubernatorial candidacies of Joseph Teasdale, a Democrat (Pet. at A21). At the time of the trial, when the plaintiffs were acting as fee agents, each plaintiff was free to and did continue to assert her partisan support of the Democratic Party (Pet. at A22).

Defendant Bond is Governor of the State of Missouri. Defendant James, when the plaintiffs were terminated from their fee agencies, was Director of Revenue for the State of Missouri (Pet. at A22). Defendant James terminated each plaintiff and appointed successors to operate the fee offices held by them, entered into contracts with successors to those offices, and began the training of successors before the terminations of plaintiffs were completed (Pet. at A22). The appointed successors to the plaintiffs were Republicans, and a majority of fee agents appointed during the term of the defendant Governor, but not all such appointments, have been Republicans.

There is little doubt that fee agency appointments have been a traditional patronage plum in the State of Missouri. That plum has been extremely lucrative to the intensely partisan politicians appointed to said agencies. Indeed, as found by the trial judge, one of the plaintiffs received net income from her agency in excess of the salary paid to the defendant Governor of the State of Missouri, and the other four plaintiffs earned net income far in excess of the salaries authorized for most employees of the Department of Revenue (Pet. at A31).

The parties stipulated to the following facts:

"The Department of Revenue does not supervise the daily operations of the fee agent offices. Fee agents are free to hire employees to operate the offices for them, or they may operate the offices themselves without additional personnel. . . . The State does not assert control over the selection or retention of the fee agents' office employees. The plaintiffs are responsible for withholding from their employees appropriate state and federal taxes. As provided for in Section 136.055, RSMo 1978, fee agents are not compensated by the state, but instead are authorized to charge persons requiring their services $1.00 per transaction as compensation. Fee agents are free to select their office location (subject to the general requirement of reasonableness) and are required to pay their own operating expenses, including rent, employees' salaries, and office equipment and supplies. Fee agents are permitted to engage in outside business activities and the majority do, but none of these plaintiffs do. Fee agents pay self-employment taxes and are not members of any state retirement system. The Department of Revenue does not have possession of keys to the offices of the plaintiffs, nor to the defendants otherwise have access to any locked areas within the fee offices of the plaintiffs. Fee agents do not account to the state for transaction service charges which they charge their customers, nor do they deposit these service charges, which represent their gross incomes, in state accounts. The plaintiffs were not included as employees of the Department of Revenue in any official state manual published after they assumed their positions, nor does defendant James intend to list the plaintiffs, or other fee agents, as employees of his department in future official manuals to be published by the Secretary of State. Defendant James

does not believe that he creates the relationship of employer-employee by appointing motor vehicle license agents. The Attorney General's Opinion issued on May 5, 1953, to the then State Comptroller and Director of the Budget by Attorney General John Dalton, represents the legal position of the State that motor vehicle license agents are not employees. None of the plaintiffs considers herself an employee of the state. Defendants Bond and James have not required that any appointed or prospective fee agent employee specific individuals, that any appointed or prospective fee agent operate their fee agencies in specific locations, or that any appointed or prospective fee agent pledge any kind of political support as a prerequisite for employment. The Social Security Administration has determined that for social security tax purposes, fee agents are not employees of the State of Missouri. The State does not guarantee that any agency will be profitable, and income of any specific agency will depend upon the locale of the agency and the individual business acumen of the agent.

There is no Department of Revenue requirement that the fee agents actually work at all in their agencies. The Department of Revenue requires that agents remain responsible for the work performed by their employees. The fee agents, as contractors doing business with the State, are responsible for the supervision of their employees."

Additionally, the parties stipulated that:

"During 1980, motor vehicle agents made a total of 4 and ½ million individual business transactions with members of the public. Total transactions in 1981 are expected to be similar in number. Defendants believe that the manner in which these transactions

are conducted, including the efficiency and cordiality exhibited by fee agents and their employees, reflects upon the State of Missouri, the Department of Revenue and the incumbent administration. . . ."

It is important to remember that each plaintiff in this case is an intensely partisan Democrat, appointed as a fee agent in a specific locality, because of her support of the Democratic Party generally, and because of her support of the Democratic Governor under whose administration she was appointed specifically. When defendants Bond and James assumed their duties in January, 1981, every individual fee agent, appointed by a Democratic Governor to act as fee agent in one of the smaller towns or cities in the state and to represent the Governor and the incumbent administration at the grass-roots, was a partisan Democrat. Each such agent was an independent business person who was not supervised by an executive policymaker. In total, these partisan Democrats conducted the lion's share of 4 and ½ million individual contacts and business transactions with citizens of the state during 1980. The only representative of state government that the average Missourian will meet or observe, in person, during any administration, is the fee agent which serves that citizen's specific locality. Because fee agents almost always hire employees which do the majority of the day-to-day work, and because most fee agents have independent business enterprises apart from their fee agencies, in January, 1981, each of these partisan Democrats were free to devote his or her time to Democratic Party politics. The services which fee agents provide to the citizens of the State of Missouri cost the State nothing, because fee agents are compensated by collecting $1.00 for each transaction from their customers.

The District Court, in direct conflict with the decisions of three separate district judges for the Eastern District of Missouri, who had earlier ruled the issue for defendants, found in favor of the plaintiffs and enjoined the defendants from terminating plaintiffs by reason of their political affiliations. Relying on a case precisely in point ruled only a matter of weeks previously, the United States Court of Appeals for the Eighth Circuit reversed the District Court and entered judgment in favor of defendants (Pet. at A3).

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The decision below is not in conflict with the applicable authority of this or any other federal appellate court.

On April 20, 1982, the United States Court of Appeals for the Eighth Circuit entered its order reversing the judgment of the District Court, thereby finding in favor of the defendants, pursuant to its decision in the earlier and indistinguishable case of *Sweeney* v. *Bond*, 669 F.2d 542 (8th Cir. 1982), *reh. and reh. en banc denied, id.*, The *Sweeney* decision had been filed on January 13, 1982 (Pet. at A3).

In *Sweeney*, the Court of Appeals reached two separate conclusions in support of its judgment in favor of respondents herein. The court found that *Elrod* v. *Burns*, 427 U.S. 347 (1976) and *Branti* v. *Finkel*, 445 U.S. 507 (1980), applied, on their face, only to the terminations of public employees and that, under the test provided by this Court in *Branti* v. *Finkel*, party affiliation is an appropriate requirement for the effective performance of the duties of appointed fee agents. With respect to both conclusions, there are no patronage cases from this or any other federal appellate court in conflict.

In *Sweeney* v. *Bond*, the Eighth Circuit was reviewing lower court opinions in three separate but indistinguishable cases decided in the United States District Court for the Eastern District of Missouri.[2] In *Sweeney*, the Eighth Cir-

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[2]The Honorable Clyde S. Cahill, United States District Court for the Eastern District of Missouri, decided *Sweeney* v. *Bond*, 519 F.Supp. 124 (E.D.Mo. 1981). Two other judges rendered decisions in accord with Judge Cahill, the Honorable William L. Hungate and the Honorable H. Kenneth Wangelin.

cuit agreed with the defendants and the United States District Court for the Eastern District of Missouri that:

> "[T]he holdings in *Elrod* and *Branti* were limited to dismissals of public employees for partisan reasons. We are not willing to extend the patronage decisions to cases which do not involve public employees. Thus, the principle inquiry becomes whether fee agents are public employees." *Sweeney* v. *Bond, supra,* 669 F.2d at 545.

In *Sweeney,* District Judge Cahill had concluded that fee agents are not public employees, but more in the nature of independent contractors or franchisees, after that issue was contested at trial. In this case, the plaintiffs stipulated that they were not public employees.

The Eighth Circuit did not just base its decision on the lack of a public employment relationship, however. The lower court also found that party affiliation is an appropriate requirement for the effective performance of fee agency duties.

> "Fee agents are not required to work in their offices. They are ree to delegate duties of the offices to workers hired by the fee agent. Thus fee agents can continue to actively participate in political activities free of the restrictions of a civil service code and without interruption of service to the fee agency. There is no cost to the government of the fee agents' service as the cost is borne by the customer. There are 158 fee agent offices in Missouri, the vast majority of which are now operated by Democrats; in 1980 there were over 4.5 million transactions between fee agents and citizens of Missouri. Fee agents are traditionally looked upon as representatives of the incumbent governor. Many spend much of their time in this way

and are not restricted in their active pursuit of party politics by the confines of their fee agent offices. We hold that political affiliation is an appropriate requirement for the effective performance of fee agents and has been so regarded by both Democrats and Republicans for many years." *Sweeney* v. *Bond*, *supra*, 669 F.2d at 546.

Clearly, given the unique and independent nature of fee agents, *Elrod* v. *Burns*, *supra* and *Branti* v. *Finkel*, *supra*, do not apply to, nor or they in conflict with, the opinion of the Eighth Circuit in this matter. The following issue was presented to this Court in *Elrod* v. *Burns*, 427 U.S. 347, 349:

> "This case presents the question whether *public employees* who allege that they were discharged or threatened with discharge solely because of their partisan political affiliation or nonaffiliation state a claim for deprivation of constitutional rights secured by the First and Fourteenth Amendments." (Emphasis added).

The plurality opinion of the United States Supreme Court in *Elrod* v. *Burns*, written by Justice Brennan and joined in by Justices White and Marshall, was very carefully restricted to the constitutionality of dismissing public employees for partisan reasons. We quote:

> "The Cook County Sheriff's practice of dismissing employees on a partisan basis is but one form of the general practice of political patronage. The practice also includes placing loyal supporters in government jobs that may or may not have been made available by political discharges. Nonofficeholders may be the beneficiaries of lucrative government contracts for highway construction, buildings, and supplies. Favored wards may receive improved public services.

> Members of the judiciary may even engage in the practice through the appointment of receiverships, trusteeships, and refereeships. Although political patronage comprises a broad range of activities, we are here concerned only with the constitutionality of dismissing *public employees* for partisan reasons." (Emphasis added). 427 U.S. at 352.

Because the plurality opinion of the Supreme Court in *Elrod* v. *Burns* was joined in by only three of the eight justices sitting on the case, it is also instructive to look to the opinion of the two concurring judges, Justices Stewart and Blackmun. Justices Stewart and Blackmun framed the issue as follows:

> "The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential *government employee* can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. . . . " (Emphasis added). *Id.* 427 U.S. at 375.

Branti v. *Finkel* did not extend the *Elrod* Doctrine beyond the termination of public employees. The issue in that case was:

> "[W]hether the First and Fourteenth Amendments to the Constitution protect an assistant public defender who is satisfactorily performing his job from discharge solely because of his political beliefs." *Branti* v. *Finkel*, *supra*, 445 U.S. at 508.

There was no dispute in *Branti* about the public employment status of the plaintiffs.

As in *Elrod*, the only issue in *Branti* referred to the dismissal of public employees for partisan reasons. We quote from footnote 7 of the *Branti* opinion:

> "Mr. Justice Brennon [in *Elrod*] noted that many other practices are included in the definition of a patronage system, including placing supporters in government jobs not made available by political discharges, granting supporters lucrative government contracts, and giving favored awards and improved public services. In that case, as in this, however, the only practice at issue was the dismissal of *public employees* for partisan reasons [citations omitted]. In light of the limited nature of the question presented, we have no occasion to address petitioner's argument that there is no compelling governmental issue in maintaining a political sponsorship system for filling vacancies in the public defender's office." (Emphasis added) *Id.*, 445 U.S. at 513 n.7.

There is no case law which supports the proposition that *Elrod* v. *Burns* and its progeny may be applied to the termination of the agency or contractual relationships of independent contractors or franchisees. The petitioners have cited the case of *McMullan* v. *Thornburg*, 508 F.Supp. 1044 (E.D.Pa. 1981), allegedly in support of the proposition that the formal existence of a public employment relationship should not be decisive.[3] Mistakenly, the petition-

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[3]The respondents believe that there are sound public policy considerations for the restriction of the *Elrod-Branti* Doctrine to public employees. Employees are supervised in their day-to-day activities by executive policymakers. The subordinates of employees, if any, are also subject to the selection, retention, discipline and supervision of government. Employees are supervised with respect to the manner in which they relate to and serve the public. They are subject to the full panopoly of disciplinary procedures available to their employers. Independent business people contracted to perform business on behalf of the State, like the fee agent plaintiffs, are not supervised in their day-to-day activities by executive policymakers, nor are they subject to the normal disciplinary processes of an employment relationship. Government does not select nor control the employees of fee agents, who typically will perform the

(Continued on next page)

ers fail to understand that the actual relevance of the *McMullan* case to the present controversy is that a separate federal judge, in addition to the three district judges from the Eastern District of Missouri and the two panels of the United States Court of Appeals for the Eighth Circuit which have considered employment in the fee agency context, found it necessary to determine the existence of a public employment relationship before he would apply the principles of *Elrod* v. *Burns*. That judge undertook the determination of the existence of an employment relationship, even though the defendant officials of the State of Pennsylvania did not raise as a defense the lack of an employment relationship.

The petitioners have not cited a single case in which the federal courts have applied the *Elrod-Branti* doctrine to persons or entities other than public employees. Indeed, no such precedent is available for the petitioners to cite. The decision of the Eighth Circuit in this case, predicated on its prior decision in an indistinguishable case, does not stand in conflict with the established precedent of this or any other federal court concerning the public employ-

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Footnote continued

day-to-day duties of agency. Unlike employees, most fee agents are engaged in independent business enterprises to which they devote the majority of their efforts, leaving agency business to their own employees. Unfettered by the usual duties of employees, including supervision by the executive branch, fee agents continue to devote a significant amount of time to the partisan political activities which originally prompted their appointment. The public employees in *McMullan* v. *Thornburg* are not comparable to the plaintiffs. The local registrars in that case were limited to a statutory salary and had much less opportunity to represent the administration in the community than do Missouri fee agents. It does not appear that the *McMullan* employees had authority to hire employees of their own, or that they operated fully independently of supervision. The state withheld income taxes and social security from the compensation paid to the public employees in *McMullan*, and included them in the workmen's compensation and unemployment compensation plans of the state. *McMullan* v. *Thornburg*, 408 F.Supp. 1044, 1046 (E.D.Pa. 1981).

ment issue. Certiorari should not be granted to review what is clearly local dispute involving the unique status of fee agents under Missouri law, a status so unique that it is not likely to be repeated within any other jurisdiction.

A much different situation would be presented if this were a case in which contracts for the construction of public buildings or for the supply of typewriter ribbons were being awarded on a political basis. In such case, an interesting and pervasive patronage question would be presented for possible Supreme Court analysis. We do not mean to say that the defendants would subscribe to a further incursion by the judicial system into the traditional authority of the states to regulate their business affairs, nor the traditional ability of the political parties to attract and retain adherants to assist in the effectuation of the democratic process. Nevertheless, such an awarding of contracts on a political basis would carry some of the traditional disadvantages of patronage, including a cost to the people governed in that a Democratic or Republican contractor would not necessarily do a cheaper and/or better job than his opponent of differing political views. The fee agent plaintiffs in this case, however, are unique and do not fit in a niche with traditional contractors for public works or supplies. They are compensated solely by their customers, and the existence of agency does not tax the processes of government. Fee agents have always been, not only the collector of automobile license fees, but the political representatives of the incumbent administration at the grass-roots. Each of these plaintiffs is an intensely partisan Democratic who was appointed as fee agent as a result of her support of the Democratic Party. Each continued to support the Democratic Party and Democratic candidates for Governor publically during the time they were fee agents. The duties of fee agents are

ministerial and easily accomplished. This is not a situation, as with the independent contractor bidding for the construction of public works, that the selection of one person as a fee agent could result in a shoddy public building. Missouri does not and has never awarded contracts on the basis of political affiliation. By Missouri law, the lowest and best bid must always be accepted. This is not the case for the Court to determine the applicability of *Elrod-Branti* to the classic independent contractor situation.

Similarly, the conclusion of the Eighth Circuit that party affiliation is an appropriate requirement for the functions performed by fee agents is not in conflict with the decisions of this or any other federal appellate court on the interpretation of the *Branti* v. *Finkel* test:

> "In sum, the ultimate inquiry is not whether the label 'policy maker', or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti* v. *Finkel, supra,* 445 U.S. at 518.

Other federal courts have not interpreted the *Branti* test in such a way as to conflict with the decisions of the Eighth Circuit. In a companion case, the United States District for the Eastern District of Missouri reached the following specific conclusions in making its judgment that party affiliation is an appropriate requirement for the effective performance of fee agency duties:

> "The fee agents have more than five million contacts with the public during their term and do serve as selected emissaries of the incumbent administration and thus reflect its concern for courtesy, efficiency, and integrity. Unlike civil servants who remain

during all administrations, the fee agents are symbols of the governor's office who do not bring the usual disadvantages of patronage employees to their posts. The unique structure of the fee agent position minimizes the usual deficiencies of patronage.

First of all, there is little or no additional cost to the government, for the fees of the agents are simply added to the costs of the licenses and taxes, thus allowing the state the full and complete measure of its taxing bounty.

Second, any citizen wanting to avoid the agent's small fee can seek out a branch office or utilize the mails to pay the license fees and taxes without paying the $1.00 fee. He may have to forego the convenience of location or scheduled availability, but that would be a luxury that he could judge the value of and accept or decline.

Third, the requirements for filling the position of fee agent are simple and generic, no special skills or professional knowledge is needed, and thus large numbers of individuals could easily qualify for the posts with little difficulty in completing the work required.

Fourth, while not requiring the confidentiality and policymaking function of the top-level positions of state government, there is the responsibility of demonstrating loyalty, efficiency, and partisan pride, which could be interpreted as a hallmark of the incumbent administration.

Fifth, the fee holder can delegate practically all of the chores and responsibility of the office to others that he employs, and thus continue to actively and fully participate in the political activities of his choice without the restriction of a civil service code or the loss of services to the state.

Sixth, the novel status of motor vehicle license fee agents supports the argument that the state interest in having such an unusual arrangement is an intentional and planned circumstance, designed to meet and overcome the shortcomings of most patronage assignments.

In summary, then, the fee agents are extraordinarily suited for partisan, political appointment, and may well be a near perfect example of the kind of role suggested in *Branti.*" *Sweeney* v. *Bond*, 519 F.Supp. 124, 129-130 (E.D. Mo. 1981).

In affirming the United States District Court for the Eastern District of Missouri, the Eighth Circuit stated as follows in *Sweeney* v. *Bond*, 669 F.2d 542, 546 (8th Cir. 1982), the case upon which the decision below was predicated:

"Fee agents are not required to work in their offices. They are free to delegate duties of the offices to workers hired by the fee agent. Thus fee agents can continue to actively participate in political activities free of the restrictions of a civil service code and without interruption of service to the fee agency. There is no cost to the government of the fee agents' service as the cost is borne by the customer. There are 158 fee agent offices in Missouri, the vast majority of which are now operated by Democrats; in 1980 there were over 4.5 million transactions between fee agents and citizens of Missouri. Fee agents are traditionally looked upon as representatives of the incumbent governor. Many spend much of their time in this way and are not restricted in their active pursuit of party politics by the confines of their fee agent offices. We hold that political affiliation is an appropriate requirement for the effective performance of fee agents

and has been so regarded by both Democrats and Republicans for many years."

We again remind the Court of the unique nature of Missouri motor vehicle license fee agents. These agents are an anomaly of Missouri law and practice not likely to be duplicated in other states. It would serve little purpose for this Court to analyze in depth the question of whether party affiliation is an appropriate requirement for the performance of fee agency duties, because such analysis would have little if any applicability to other factual situations which may arise in the future and would, therefore, have little general precedential value.

II.

Given the restricted precedential value of Supreme Court review of this case, the grant of certiorari is unwarranted.

The decision of the court below in this case turned upon facts which are unique to an unusual anomaly of Missouri law and practice, the motor vehicle license fee agent. Supreme Court review would effect only the litigants and other Missouri fee agents. Not only are the decisions below correct, which in and of itself should lead to the denial of the petition, and not in conflict with other applicable federal precedent, but the factual situation upon which the decisions of the Eighth Circuit turned are sufficiently specific only to the litigants so as to render further review of limited precedential value.

The decisions below represent the independent conclusions of three separate district judges, from the Eastern District of Missouri, and two unanimous panels of the Court of Appeals. Only the district judge from the Western District in the present case reached a conclusion which would support the petitioners.

Elrod v. *Burns* and its progeny have created a de facto civil service for public employees. This civil service system imposed upon the State of Missouri with respect to its relationship to its employees has supplanted the independent decision-making processes of the Missouri Legislature which has itself designated those public employment positions which should be covered by a merit system. Missouri had extended merit system protections to the majority of its public employees far in advance of the 1976 decision in *Elrod*. That this imposition upon the traditional authority of the states to determine which public employment positions are to be protected in the nature of a civil service system is contrary to the historic realities of political life in the states is amply demonstrated by the dissenting opinions of Justice Powell in *Elrod* and *Branti*. *Elrod* v. *Burns*, 427 U.S. at 376-389; *Branti* v. *Finkel*, 445 U.S. at 521-534. This Court should look with disfavor at the prospect of granting certiorari in a case in which the petitioners are seeking an extension of the *Elrod* Doctrine into the area of state franchisees. The democratic process is dependent in large part upon the ability of political parties to attract and retain the services of partisan adherents. Political parties depend upon contributions of time and money from their active participants. The plaintiffs in this case are excellent examples of intense and loyal political partisans, having donated considerable time and money to the 1976 and 1980 gubernatorial campaign of ex-Governor Joseph Teasdale, who defendant Bond defeated in the 1980 election. The present case does not present the situation where lucrative government contracts, for a specific construction project or the supply of specific goods over a limited period, are awarded on the basis of the political affiliation of the bidding parties. Rather, this case involves the traditional method by which local political lieutenants are both rewarded for their services and com-

pensated during the term of the administration in which they helped elect so that they may continue to participate in the political process. Because this case, and *Schenberg* v. *Bond*, No. 18-2046, turn entirely upon their own unique facts, certiorari should not be granted to determine whether the *Elrod* doctrine should be applied to protect the franchisee positions of these intensely partisan opponents of the defendants.

There have been fee agents in Missouri since approximately 1950. Traditionally, these agents have been looked upon as grass-roots representatives of the incumbent administration. When the defendants assumed office in January, 1981, each of 137 individual fee agents appointed to localities throughout the State of Missouri was a highly partisan Democrat. Patronage was the hallmark of the administration which proceeded that of the defendants. Governor Bond, during his first administration of 1973 through 1977, appointed many non-partisan civic organizations as fee agents and retained many Democrats in agency positions. Petitioner Finks, for example, was appointed during the administration of former Governor Warren Hearnes and was not terminated during the first administration of Governor Bond (Pet. at 821). In addition, some of the new agency appointments during this administration have been Democrats, additional civic organizations have been appointed as fee agents, several Democratic fee agents have been reappointed, and many Democrats have not been terminated. This is in sharp contrast to the situation which prevailed from 1977 through 1981 when the majority of the non-partisan civic organizations appointed by Governor Bond were terminated, when all Republican agents were terminated, and when each and every individual fee agent was a partisan Democrat.

Because each of these fee agents was able to hire

employees completely outside the control of the Missouri Department of Revenue and because most of these fee agents have additionally been engaged in separated and distinct business enterprises, each was free to devote considerable time in support of partisan party politics. This structure providing local political representatives at the grass-roots cost the State nothing because fee agents are compensated solely by means of collecting transaction service charges from their customers, which charges are optional in that customers may choose to do business directly with the State. The plaintiffs are independent business people having been franchised with authority to transact certain limited and specific types of revenue producing business for the State. Fee agents perform four and one-half million transactions with citizens of the State each year. As individual contractors or private business people, the plaintiffs, and motor vehicle license agents generally, operate free of the restraints normally imposed upon government employees. These individuals are not subjected to the daily supervision of the executive policy makers, nor are their employees chosen or supervised by government. As long as fee agents account to the State for its property or revenue collected, they are not subjected to state government supervision over their day-to-day activities or the manner and means in which they interact with the public. The only control which defendants can assert over fee agents to ensure their loyalty, integrity and efficiency, and to protect the revenue collected on behalf of the State, is the power to appoint and terminate.

The existence of fee agents is a phenomenon unique to the State of Missouri. Because of the unique nature of fee agents, none of the disadvantages of patronage discussed by this Court in *Elrod* v. *Burns* and *Brandt* v. *Finkel* are presented by the factual situation now before the Court.

We submit that the decisions of the Eighth Circuit in this case and in *Schenberg* v. *Bond*, No. 81-2046, are logical and correct. The decisions are not in conflict with any existing federal court precedent. There are no patronage disadvantages to the appointment of fee agents by an incumbent Governor and his Director of Revenue. Because of the unique and unusual status of fee agents in the State of Missouri, this Court should deny certiorari because the factual situation herein involved would not be so generally applicable as to provide a sound basis for generalized legal precedent. The very uniqueness of the factual situation in this case precludes review by this Court. The clear purpose of the plaintiffs in bringing these cases is to embarrass a governor who has consistently, over two terms of office, attempted to alleviate the abuses of patronage in this State. These petitioners are not innocent functionaries being discriminated against because they are Democrats. One of the petitioners received a net income from fee agency in excess of the governor's salary. All were compensated in excess of traditional employees of the Department of Revenue (Pet. at 831). The petitioners are political opponents of the respondent whose candidate failed at the last gubernatorial election. The local political posturing represented by these cases should not be glorified by the grant of certiorari.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted:

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